APPENDIX.

Opinion of the District Court.

BIGGS, *Circuit Judge.*

I am somewhat handicapped in passing upon the pending applications by reason of the fact that my connection with this case is of comparatively recent date. I have endeavored to do substantial justice to the parties and have examined the complete record carefully.

The following allowances by way of compensation and for reimbursement of expenses will be made in this case.

Applicant.	Compensation Allowed.	Expenses Allowed.
William H. Foulk Attorney for the Debtors	$15,000.00	$626.91
Estate of Ernest Stewart Attorney for the Debtors	2,000.00	—
Robert M. Weidenhammer President of the Debtors	00.00	—
Davies, Silverstone & Co. Accountants for the Debtors	1,045.00	—
The Chase National Bank of the City of New York and John A. Burns, Indenture Trustees	2,500	6.33
Milbank, Tweed & Hope Attorneys for Indenture Trustees	2,000.00	175.58
Southerland, Berl & Potter Attorneys for Indenture Trustees	1,000.00	27.00

Applicant.	Compensation Allowed.	Expenses Allowed.
Richards, Layton & Finger Attorneys for Bondholders Committee	500.00	—
Laurence R. Lunden Bondholders Committee's Expenses	—	00.00
Maurice P. Angland, Secretary, on behalf of Bondholders Committee	00.00	—
Maurice P. Angland, Individually	00.00	—
E. Joseph Seifert As a member of Bondholders Committee	100.00	—

I shall discuss briefly the application of Robert M. Weidenhammer, the president of the debtors, and those of Maurice P. Angland, individually and as secretary of the Bondholders Committee. Weidenhammer testified that he had loaned Angland twenty bonds of a market value of about $8,000. in 1934 with the understanding that this amount would be paid back in a year. Angland did not return the loan and according to Weidenhammer's statements he became a kind of involuntary partner in Angland and Company, then a partnership, in order to try to get his money back. On January 2, 1935 this informal arrangement was superseded by a formal partnership agreement and at the beginning of 1936 a corporation was formed, styled Angland and Company, Inc. Angland and Weidenhammer each owned half of the stock of this Corporation. Weidenhammer and Angland were both members of a Bondholders

Committee which formally came into being about the middle of the year 1935. Shortly after this and some time before the petitions for reorganization were filed Weidenhammer and other members of the Committee became the debtors' board of directors and Weidenhammer became a member of the executive committee. Angland became a director in 1936. Petitions for reorganization pursuant to the provisions of Section 77B were filed in this court on June 22, 1937, and a month later Weidenhammer became the president of the debtors. No trustees were appointed by the court and the debtors were continued in possession. These facts clearly demonstrate that both Angland and Weidenhammer had a fiduciary relationship to the debtors and that this relationship has continued in Weidenhammer's case up to the present time. Angland's fiduciary relationship was terminated when the committee on which he served was dissolved.

Section 249 of the Bankruptcy Act provides in part,

> ". . . No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold . . . claims or stock, or by whom or for whose account . . . . claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred." Section 276 (c) (2) provides that "if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable."

By the order of this court of June 6, 1942, approving the plan of reorganization, certain provisions of the amend-

atory act were made applicable to the present proceedings. I am of the opinion that the provisions of Section 249 should be deemed to be applicable to the present applications for compensation.[1] Indeed, at the hearings in respect to compensation and in their briefs the parties most concerned have assumed that the provisions of Section 249 were in effect. It is just to apply them.

The record shows that the Angland brokerage house dealt in the bonds of Cosgrove-Meehan Coal Corporation for its own account while the fiduciary relationships which I have described existed. While Angland testified that he had given instructions that his trader was not to buy the securities of the debtors for the account of either the partnership or the corporation, the record demonstrates that these instructions were not obeyed. Weidenhammer and Angland are debarred from the compensation which they now seek by virtue of the provisions of Section 249. See the decision of the Court of Appeals of this Circuit in In re Reynolds Investing Company, Inc., F. (2nd).

Another and serious question is presented by the compensation which has already been paid to Weidenhammer pursuant to orders entered by Judge Nields in this court on September 7, 1937 and on December 30, 1937, allowing him compensation as president of the debtors, first in the sum of $100 a month and later in the sum of $200 a month. Prior to the passage of Chapter X, applicants for compensation frequently were barred from receiving it if they came into court under circumstances which indicated they had acted for private gain in an abuse of a fiduciary relationship which existed between them and the debtor or its security holders. This consists of nothing more than the

[1] An order will be entered to such effect.

application of the ancient equitable doctrine of "unclean hands", that he who seeks compensation as a result of a fiduciary relationship must render loyal and disinterested service. See In re Mountain States Power Co., 118 F. (2nd) 405, 407-408, and the authorities therein cited. Weidenhammer served as president of the debtors for more than four years. That he rendered loyal and effective service seems to be attested by the Securities and Exchange Commission and by the counsel for the debtors. I am convinced that he served the debtors at a not inconsiderable sacrifice in personal income. He has been continued as president as a result of the consummation of the plan of reorganization approved by the court. None the less his connection with the Angland brokerage house clearly appears. Should he be compelled to return the compensation which he has already received?

Apparently Weidenhammer did not pay close attention to the transactions of the brokerage concern. He should have done so, of course. Though his interest therein was substantial he seems to have had very little to do directly with the transactions of the concern and he appears to have had little, if any, personal knowledge of them. He received small, if any, profit therefrom. The house soon entered receivership. In view of all of the circumstances I conclude it would be unjust to compel Weidenhammer to return the $11,200 which he has received as a result of more than four years' work as the president of the debtors. To compel him to do so would require setting aside the orders made by Judge Nields and treating them as improvidently entered in an abuse of the very wide discretion which must be exercised by a district judge in administering estates in reorganization. I shall not take this step. It must be un-

derstood, however, that my decision in this regard is based upon the facts of this particular case and must not be regarded as a precedent.

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(Omitted portion deals with claim of one Laurence R. Lunden).

As to the application of the Bondholders' Committee for allowance, so far as Angland is concerned, compensation to him as a member of the Committee will be barred by reason of the provisions of Section 249. As to Seifert, I conclude that he is entitled to some small compensation as a member of the Committee. Accordingly I will allow him the sum of $100.00. As to the Committee's counsel, the record shows that their services were of aid to the administration of the debtors' estates. They made one appearance in court and successfully opposed an application to remove the cause to the Western District of Pennsylvania. They performed other services which were of some value to the reorganization. I shall allow them compensation in the sum of $500.00.

JOHN BIGGS, JR. (S)
U. S. Circuit Judge.

Dated: September 15, 1942.

Opinion of the Circuit Court of Appeals.

(Filed May 24, 1943.)

Before MARIS, JONES and GOODRICH, *Circuit Judges.*

JONES, *Circuit Judge.*

In a proceeding under Section 77B of the Bankruptcy Act for the reorganization of Cosgrove-Meehan Coal Corporation, debtor, (subsequently expressly made subject to the provisions of Chapter X by court order), the District Court denied two separate applications of one Maurice P. Angland for allowances of compensation for services said to have been beneficial to the reorganization. On Angland's petition we granted him leave to appeal from the order below.

The one application covers services performed by the claimant as a member of a committee of the debtor's bondholders which committee functioned both prior to and during the reorganization proceeding. The other application is for services performed prior to the reorganization proceeding, while the claimant was acting as the agent or trustee of the debtor corporation in salvaging properties of an Illinois corporation, then in bankruptcy, which was owned by the debtor. The interest in the Illinois corporation constituted approximately eighty per cent of the debtor's total assets. It is the claimant's theory, and testimony was offered to prove, that the salvaging of the properties of the Illinois corporation was a prerequisite to and in anticipation of the reorganization of the debtor.

While serving in the capacities above indicated, Angland was also a member of an investment firm (later incorporated) which at times hereinafter to be designated dealt in bonds of the debtor corporation. Also certain of like

bonds which he had pledged as security for a liability upon a note were sold by the pledgee during the reorganization proceeding without application to the court (having charge of the reorganization) for its approval. It is only fair to mention that, at the time of this sale, the Chandler Act had not been enacted. However, the reorganization proceeding was later subjected to the provisions of Chapter X.

The questions presented are (1) whether the dealings by Angland or his investment firm in bonds of the debtor corporation brought him within the disqualifications imposed by Section 249 of Chapter X of the Bankruptcy Act with respect to his claims for allowances in the reorganization proceeding, and (2) whether he is entitled in that proceeding to an allowance of compensation for services performed by him in salvaging property of the debtor prior to the bankruptcy, which ultimately constituted the major part of the debtor's assets dealt with in the reorganization proceeding.

Angland became a member of the committee of the debtor's bondholders about the middle of 1935. He was then the owner of a one-third interest in about one hundred of the debtor's bonds, his interest therein having been pledged by him to secure a loan upon which he was personally liable to the extent of one-third of the principal thereof. He also owned a fifty per cent interest in and was the active manager of Angland & Co., a partnership, which was engaged in the securities business. In January 1936 this partnership was succeeded by a corporation (Angland & Company, Inc.), wherein Angland owned a fifty per cent stock interest and whereof he was likewise the active manager. Between June 1935 and July 1936 the firm of Angland & Co. or its successor corporation executed orders for the sale of

one hundred twenty of the debtor's bonds for customers and a few of such bonds from the firm's inventory. The debtor's petition for reorganization under Section 77B was filed June 22, 1937.

In October 1937 Angland & Company, Inc., went into receivership, and in January 1938 the bank loan for which Angland was personally obligated was called and his one-third interest in the one hundred bonds of the debtor, pledged as security for the loan, was sold by the pledgee. The sale appears to have been necessary. At that time, a drop of an additional point in the market value of the bonds would have rendered the collateral insufficient to liquidate the loan. Angland was then a member of the bondholders' committee, as he had continued to be since the middle of 1935.

In May 1936, more than a year prior to the filing of the petition for reorganization, the debtor appropriated $2,500 to be used by the nominee of one Farley, Angland's attorney, to acquire in the debtor's behalf title to the properties of its Illinois subsidiary in bankruptcy, freed from numerous encumbrances to which they were then subject. Farley nominated Angland for the work. Between May 1936 and March 1937 Angland performed extensive services, more particularly specified in his claim for compensation, which produced for the debtor corporation properties of substantial value.

The District Court denied both of Angland's claims on the ground that he was disqualified as a claimant for compensation in the reorganization proceeding because of Section 249 of Chapter X. So far as the claim for compensation as a member of the bondholders' committee is concerned, we think the ruling of the court below was

unquestionably correct. While it is true, as Angland urges, that the last of the voluntary transactions by him or his firm in bonds of the debtor corporation occurred almost a year prior to the institution of the reorganization proceeding, he was none the less a member of the bondholders' committee when those transactions took place and it is in his capacity as a member of the same committee that he now claims compensation in the reorganization proceeding. He makes no attempt to sever his services as a committee member prior to the reorganization proceeding from the services performed by him in like capacity after the institution of that proceeding. Nor can we perceive how he could make any such severance. The character of his fiduciary relation as a committee member was a continuing status of identic quality throughout, regardless of when the reorganization proceeding was instituted. Angland's claim for compensation as a committee member therefore falls within the disqualifying specifications of Section 249. Cf. In re Reynolds Investing Co., Inc., 130 F. 2d 60 (C. C. A. 3).

Moreover, the sale of Angland's interest in the one hundred bonds of the debtor corporation by the pledgee thereof in January 1938 was alone sufficient to disqualify him as a committee-member claimant for compensation in the reorganization proceeding. It is not only voluntary purchases or sales of a debtor's securities to which Section 249 applies. It denies compensation as well to any person acting in a reorganization proceeding in a representative or fiduciary capacity *for whose account* claims against or securities of the debtor have been purchased or sold without the prior consent or subsequent approval of the judge in the reorganization proceeding. The bona fides of such purchases or sales is not material under Section 249. See In re

Reynolds Investing Company, *supra,* at p. 62. True enough, Section 249 was not in force when Angland's pledgee sold the pledged bonds in January of 1938, but the proceeding was later made subject to Chapter X by express order of the court and the matter has since been treated with by all parties on the basis that Chapter X is applicable to the proceeding. When Chapter X became pertinent, Angland could then have applied for the court's approval of his own or his pledgee's antecedent sales of bonds of the debtor.

If the claim for compensation for services performed by Angland as the debtor's agent or trustee for the salvaging of its property prior to bankruptcy may competently be considered as a charge against the reorganization proceeding, the provisions of Section 249 are likewise fatal to its allowance. But, in the view we take, that claim is in no sense a reorganization claim. Cf. In re Ulen & Co., 130 F. 2d 303, 305 (C. C. A. 2). The service was undertaken and completed, as it was intended so to be, prior to the institution of the reorganization proceeding. It was a claim against the debtor's property like that of any other creditor except that it carried with it an equity entitling it to consideration for priority of payment out of the fund which the services claimed for had produced. But such claims, like the claims of all other creditors, are matter for appropriate treatment in the plan of reorganization where claims against the debtor are recognized and dealt with according to their grade.

While the time for proving claims against the debtor's estate has passed, we think that the applicant's showing as to the character, extent and value of his service in salvaging the debtor's property prior to bankruptcy is such as to entitle him to apply for a reopening of the proceeding in order

that the merit of his claim may be considered and passed upon. Cf. Mohonk Realty Corporation v. Wise Shoe Stores, Inc., 111 F. 2d 287, 288-289 (C.C.A. 2) cert. den. 311 U. S. 654. *In so saying, we intend neither implication nor suggestion with respect to the merit or timeliness of such an application or the claim to which it refers, which remain matters for the independent judgment of the District Court according as the facts and the law may warrant.** Not being a claim for services in connection with the reorganization proceeding, it is not subject to the conclusive barrier raised by Section 249 of Chapter X of the Bankruptcy Act. However, it is none the less subject to scrutiny on the basis of the equitable principle that one who acts in a fiduciary capacity may not deal with the subject matter of his trust so as to bring his own personal interest into conflict with his duty to his beneficiaries. Michoud et al. v. Girod et al., 45 U. S. (4 How.) 502, 555-557; see also In re Mountain States Power Company, 118 F. 2d 405, 407 (C.C.A. 3), and cases there cited. Whether Angland's sale of bonds of the debtor corporation while he was acting as the debtor's agent or trustee for the salvaging of its property prior to its bankruptcy created, either actually or impliedly, a conflict between his personal interest and his fiduciary obligations is for the trial court to determine preliminarily. Short of the conclusive inhibition of Section 249, it is to such a determination that the equitable principle to which we have referred may become germane.

To the extent that the order of the District Court denied the applicant's claim for compensation for his services in salvaging the debtor's property prior to bankruptcy on the

*Italicized portions are amendments supplied by order of the Court dated June 17, 1943.

round that the claim was barred by Section 249 as one rising out of a reorganization proceeding, the order is eversed and the cause is remanded for the purpose of ermitting the claimant to apply to the District Court for reopening of the proceeding, *if in the opinion of the Dis-rict Court such action is warranted,** in order that claim nay be considered and passed upon as a claim against the ebtor's estate in bankruptcy.

So ordered.